

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Grande Communications' Petition for)	WC Docket No. 05-283
Declaratory Ruling Regarding Intercarrier)	
Compensation for IP-Originated Calls)	

REPLY COMMENTS OF CHOICE ONE COMMUNICATIONS INC.

Choice One Communications Inc. ("Choice One") hereby submits its reply comments on the Petition for Declaratory Ruling ("Petition") submitted by Grande Communications, Inc. ("Grande") in the above-captioned proceeding.^{1/}

INTRODUCTION

Grande's Petition should be granted because Grande has simply requested that the Commission affirm its prior rulings regarding the treatment of IP-enabled traffic. Specifically, Grande asks the Commission to confirm that when one of Grande's Voice over Internet Protocol ("VoIP") customers certifies that a call originates in IP format at the calling party's premises, terminating local exchange carriers ("LECs") may not assess access charges on that call. Contrary to the position of the commenting incumbent local exchange carriers ("ILECs"), the Commission has made clear that, with the exception of two limited circumstances, IP telephony is not subject to access charges. The traffic at issue in the Grande Petition does not fall within those two categories.

Nevertheless, it appears that some ILECs have chosen to apply their own erroneous interpretation of the law and impose access charges on certain exempt IP traffic. Accordingly,

^{1/} *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Docket No. 05-283, Public Notice, DA 05-2680 (rel. Oct. 12, 2005).

Choice One respectfully requests that the Commission grant the Grande Petition and make the following limited rulings, confirming that: (1) IP-originated traffic is reciprocal compensation traffic and thus not subject to access charges; (2) LECs may rely on certifications from their customers that the traffic is originated in IP; and (3) terminating LECs may not use self-help – *e.g.*, blocking of certified traffic sent over local interconnection trunks – in an attempt to recover access charges in this situation.

DISCUSSION

The Commission has ruled unambiguously that, except for two narrow situations, IP telephony is not subject to access charges. In 1983, the Commission determined that enhanced service providers (“ESPs”) would be exempted from interstate access charges, and were eligible to terminate traffic to the public switched network through the purchase and use of local telecommunications services.^{2/} The Commission crafted this exception to ensure that enhanced services would “continue to burgeon and flourish” in an unregulated environment.^{3/} Indeed, as Grande points out, this exemption was adopted to further the Commission’s policy of promoting the development of enhanced and information services.^{4/} In the *ICC NPRM*, issued in 2001, the Commission confirmed these rulings and stated that IP telephony “is exempt from the access charges that traditional long-distance carriers must pay.”^{5/} Three years later, the Commission

^{2/} *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983).

^{3/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, ¶¶ 127-28 (1980) (subsequent history omitted); *see also Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, ¶ 83 n.34 (1981) (determining “that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if [information] services are free from public utility-type regulation”) (subsequent history omitted).

^{4/} Grande Petition at 10.

^{5/} *Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 133 (2001) (“*ICC NPRM*”); *see also id.* ¶¶ 6, 12 (acknowledging the various exceptions to which both the reciprocal

reiterated this exact point when it crafted one of the exceptions mentioned above to the access charge exemption for IP-enabled calls,^{6/} and when it restated the policy in the 2004 *IP-Enabled NPRM*.^{7/}

If the Commission's position actually were that all "non-local" phone-to-phone IP-enabled calls are subject to access charges – as many of the ILECs in this proceeding contend – then there certainly would not have been the need for the Commission to issue its detailed *AT&T IP-in-the-Middle Order*. The Commission would not have had to emphasize that its decision was restricted to the type of service described by AT&T – *i.e.*, one that uses ordinary customer premises equipment ("CPE"), originates and terminates on the public switched network ("PSTN"), and undergoes no net protocol conversion and provides no enhanced functionality to end users.^{8/} Instead, the Commission would merely have released a one-page order clarifying that IP calls are no different than PSTN calls for access charge purposes. The Commission did not take that approach because, as Grande and other commenters explain, "under current

compensation and access regimes are subject, including that access charges generally are not applicable to long-distance calls handled by ISPs because of the ESP exemption).

^{6/} See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457, ¶ 9 (2004) ("*AT&T IP-in-the-Middle Order*") (citing *ICC NPRM* ¶ 133) (noting that the Commission had "mentioned the application of access charges to VoIP" in the *ICC NPRM*, and stated therein that "[IP] telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay"). To be sure, in a 1998 Report to Congress (known as the "Stevens Report"), the Commission predicted that *future* proceedings would require it to consider "the regulatory status of various specific forms of telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to consider that they are 'telecommunications carriers.'" *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 91 (1998). Nevertheless, the Commission has not yet acted on the two relevant proposed rulemakings commenced since that date. See generally *ICC NPRM and IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP-Enabled NPRM*").

^{7/} *IP-Enabled NPRM* ¶ 30.

^{8/} *AT&T IP-in-the-Middle Order* ¶ 1.

Commission policies and practice, ‘IP telephony [is] generally exempt from access charges . .

.’^{9/}

Not only do the ILEC commenters ignore the law, they rely on rulings that simply are not relevant to the question at issue in the Grande Petition. Several ILECs, for instance, have seized on and distorted holdings in two 1997 Commission orders to support their proposition that the access charge exemption is not applicable to VoIP services. In particular, they argue that the protocol conversion from IP to TDM in a VoIP-originated call is somehow equivalent to the conversion necessary to accommodate outdated CPE, the latter of which the Commission has found does not make a service enhanced.^{10/} As Broadwing and Level 3 explain, however, in offering IP-to-PSTN services, providers engage in protocol conversions not to ensure compatibility between the network provider and its customers’ aging CPE, but rather to allow compatibility among multiple networks.^{11/} “IP technology enables advanced, enhanced features that are not possible with ordinary circuit switching,” such as storing number and voicemail messages on the carriers’ servers and making them available to other IP-enabled communications

^{9/} Grande Petition at 15 (quoting *ICC NPRM* ¶ 6). Concurrent with its release of the *ICC NRPM*, moreover, the Commission found in the *ISP Remand Order* that, although all “ISP traffic is properly classified as interstate,” under the ESP exemption, it is subject to reciprocal compensation rather than access charges. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶¶ 53, 55 (2001) (“*ISP Remand Order*”), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), petition for reh’g and reh’g en banc denied (Sept. 24, 2002), cert. denied 1123 S. Ct. 1927 (2003). The U.S. Court of Appeals for the D.C. Circuit subsequently overturned the Commission’s conclusion in the *ISP Remand Order* that ISP traffic falls within section 251(g) of the Act (which permitted the assessment of access charges instead of reciprocal compensation for certain types of telecommunications traffic as a transitional mechanism), but it did not disturb the Commission’s ruling that ISP traffic is interstate and subject to the ESP exemption. See *WorldCom, Inc. v. FCC*, 288 F.3d 429.

^{10/} See, e.g., Comments of the United States Telecom Association (“USTelecom”) at 11-12 (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 12 FCC Rcd 2297, 2298 n.6 (1997) (discussing the “new technologies exception” to rule that net protocol conversion makes a service enhanced)).

^{11/} Reply Comments in WC Docket No. 05-276, Initial Comments in WC Docket No. 05-283 of Broadwing Communications, LLC and Level 3 Communications, Inc. at 9-10.

users.^{12/} The use of IP is not limited to the management or operation of telecommunications systems or services, which was the purpose of the “new technology exception.”^{13/}

The other 1997 order now revived by the ILECs does not even stand for the proposition the commenters attribute to it. Specifically, several ILECs contend that the Commission has limited the ESP access charge exemption to circumstances in which the exchange access service is used to connect an ISP with its own subscribers.^{14/} Although the Commission was indeed addressing that particular form of interconnection in its 1997 *Access Charge Reform Order*, the Commission never has restricted the ESP exemption solely to calls terminated to an ISP. On the contrary, as discussed above, the Commission has expressly recognized that access charges are inapplicable when calls are originated by VoIP customers regardless of whether the calls are terminated on the ISP’s own network or on the network of another provider.^{15/}

Most egregious of the ILECs’ recent claims in their quest to expand the application of access charges to VoIP calls is their mischaracterization of the Commission’s policy goal statement from the pending *IP-Enabled NPRM* as settled law. In that NPRM, the Commission expressed its belief that all service providers that send traffic to the PSTN should be subject to similar obligations.^{16/} The Commission did not, however, assert or even imply that it has reversed its prior rulings exempting VoIP traffic from access charges. Moreover, the ILECs

^{12/} Broadwing/Level 3 Comments at 10-11.

^{13/} Broadwing/Level 3 Comments at 12-13.

^{14/} See, e.g., USTelecom Comments at 11 (citing *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, ¶¶ 344-48 (1997)).

^{15/} See, e.g., *AT&T IP-in-the-Middle Order* ¶ 9. In the *AT&T IP-in-the-Middle Order*, the Commission also explained that it was not clear whether its prior statement in the *IP-Enabled NPRM* that IP telephony is exempt from access charges “was intended to include phone-to-phone services *that use IP in the backbone*.” *Id.* at n.67 (emphasis added). This strongly suggests that the Commission understood that *IP-originated* calls were indisputably included within the exemption.

^{16/} *IP-Enabled NPRM* ¶ 61.

conveniently ignore the Commission's many statements in favor of identifying a *unified* approach to intercarrier compensation for *all* traffic passing over the PSTN – an approach that would not permit the application of access charges to any traffic irrespective of its originating or terminating end points.

Nor is there any merit to the ILECs' concerns about Grande's proposed reliance on customer certifications that the traffic they deliver is originated in IP format. Although some commenters contend that the only relevant factor in determining whether access charges apply are the originating and terminating phone numbers, when a call is originated in VoIP those numbers have no significance. Under the Commission's rulings, access charges are not permissible when a call is originated in IP format, irrespective of the location of the VoIP end user.^{17/}

Because the various functionalities of VoIP service are “designed to overcome geography, not track it,”^{18/} there is no support for the ILECs' current arguments that geographic end points or the presence of another carrier in an IP-originated call path somehow make the imposition of access charges permissible. As the Commission has made clear, VoIP service

is far too multifaceted for simple identification of the user's location to indicate jurisdiction. . . . As networks have changed and the services provided over them have evolved, the Commission has increasingly acknowledged the difficulty of using an ‘end-to-end’ analysis when the services at issue involve the Internet. [Vonage's] DigitalVoice shares many of the same characteristics as these other services involving the Internet, thus making jurisdictional determinations about particular DigitalVoice communications based on an end-point approach difficult, if not impossible.^{19/}

^{17/} See *ICC NPRM* ¶¶ 6, 12.

^{18/} *Vonage Order* ¶ 25.

^{19/} *Vonage Holdings Corporation Petition for a Declaratory Ruling*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶¶ 23-24 (2004) (“*Vonage Order*”).

Unless and until the Commission eliminates geographic distinctions altogether as a basis for assessing any form of intercarrier compensation, it will remain necessary for originating and transport providers to have a means to separate VoIP calls from access calls. Certifications of the sort Grande proposes are a perfectly valid means of accomplishing this objective.

CONCLUSION

For the foregoing reasons, Choice One respectfully requests that the Commission grant Grande's Petition by clarifying that (1) IP-originated traffic is reciprocal compensation traffic and not subject to access charges; (2) LECs may rely on certifications from their customers that the traffic is originated in IP; and (3) terminating LECs may not use self-help – *e.g.*, blocking of certified traffic sent over local interconnection trunks – in an attempt to recover access charges in this situation.

Respectfully submitted,

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